IN THE

Supreme Court of the United States

October Term, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals is reported at 356 F. 2d 247, and is reprinted in the printed Transcript of Record (R62-R72)*.

The opinion of the District Court for the Southern District of New York (Charles H. Tenney, U. S. D. J.) is not reported and is reprinted in the Record (R60-R62).

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1966 (R73). Extension of time to file a petition for rehearing and rehearing en banc was granted on

* Page numbers beginning with "R" refer to the printed Transcript of Record.

February 7, 1966 (R73). Such petitions were timely filed and were denied, without opinion, on March 17, 1966 (R74).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

Is a ship rendered unseaworthy by an officer's failure to provide sufficient manpower for performance of particular task, resulting in the adopting of an unsafe method of using otherwise safe gear?

Does overall sufficiency of manpower aboard ship bar imposition of liability for unseaworthiness for an injury arising out of shortage of personnel in the performance of a particular task?

May the manner of use of otherwise safe equipment give rise to liability for unseaworthiness?

Statement of the Case

On May 8, 1960, respondent's vessel was docking at its Brooklyn pier (R2). Petitioner, an able-bodied seaman, was participating in the docking operation from the stern of the vessel (R3-4).

The usual docking crew at the stern consisted of five unlicensed personnel and the Third Mate (R28, R55, R61). The docking operation commenced at 1:20 P. M. and was over at 1:31 P. M., a total of 11 minutes (R12-13, R47).

During the docking operation an additional line was put out from the vessel to the dock from a chock somewhat farther forward in the stern area than was usually employed. Petitioner and another seaman, Walter Chowaniec,

were directed by the Third Mate, Tarantino, to let out this additional line (R5-R6, R19-R20).

This line was 8-inch manila rope (R7). It was coiled approximately 56 feet from the chock through which it was to be let out (R20, R27).

There was evidence that the steel deck surface between the coiled rope and the forward chock was moist from fog and rain, tacky from wet paint, and of difficult and slippery footing (R3, R13-R16, R21). The work of putting out the lines had to be, and was being, performed "as quickly as possible" (R20, R48).

The 56 feet of line, if dry, weighed 104.72 pounds. If wet, it weighed more, and the evidence suggested that it was wet (R15-R16).

While Chowaniec and the petitioner were hauling this line towards the chock, petitioner fell and injured his back (R10-R11, R21-R22, R23).

Petitioner's maritime expert, Dewey Darrigan, a seaman for fifty years and a licensed captain for twenty-five years (R23-R25), stated that the particular job of carrying this line from where it was coiled to the chock required "three or four men" (R33, R37, R42, R46, R51-R52, R53). In Captain Darrigan's experienced and expert opinion the manila line should not have been used and carried in this manner and the performance of the task by only two men "was an unsafe operation" (R38).

Captain Darrigan testified:

> "I would say to drag a line 60 feet or more would need 3 or 4 men at least of that type and weight. (R33)
>
> • • •
>
> I would figure that that is an 8 inch mooring line and to drag it along the deck or the street, there is a lot of physical strength needed. (R34)
>
> • • •

My opinion is that this was an unsafe operation. (R38)

* * *

Q. . . . do you nevertheless feel that safe and prudent seamanship dictated that 3 or 4 men be assigned to take this line from the place marked with the R to the chock marked with the II? A. I do. (R42)

* * *

Q. What is your opinion as to whether the vessel was sufficiently manned with regard to the aft deck docking gang? A. I said no." (R53)*

Respondent's counsel contended on cross-examination that there were "25 common factors" hypothetically relevant to the docking operation (R45). This, however, was hardly probative in the circumstances of this case.

The docking was at a Brooklyn pier in New York Harbor, at high noon on a May day (R17). According to the log it took only 11 minutes, with no unusual weather, tide or shipping conditions (R47-R48). To a man of Captain Darrigan's experience, there were no special or unusual conditions requiring adjustment of his basic view that the safety of the job required three or four men. On redirect examination, he specifically stated that the hypothetical "25 other factors" in no way changed his opinion that the particular job here involved, under the actual circumstances

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* Captain Darrigan's expert testimony was probably not even necessary for petitioner's *prima facie* case. A jury could well have found that the safe performance of the urgent hauling of a wet 56-foot manila line of 8" diameter, weighing over 100 pounds, across a misty steel deck and letting it out through a chock required more than two men, particularly in the light of testimony that the custom was to provide at least 3 men for such tasks (R7-R9). *Salem* v. *U. S. Lines Co.*, 370 U. S. 31, 35-7 (1962).

shown by the ship's log, would require three or four men (R46).*

Upon this record and notwithstanding Captain Darrigan's flat assertion that the ship was insufficiently manned at the precise time and place of the accident (R53) and that the work as performed constituted an unsafe operation (R38), before the case was submitted to the jury the trial judge (Tenney, J.) dismissed petitioner's claim of unseaworthiness with respect to the alleged shortage of personnel for the task at hand (R55-R56).**

Respondent had presented proof that the overall number of seamen aboard the vessel met the Coast Guard minimum requirements and that the overall number of men assigned to the docking crew at the stern of the vessel at the time of the accident constituted the usual number of five men and one officer (R54-R55, R61).

Respondent's legal contention was that the other three men were engaged in necessary tasks at the time of the accident, and that its liability, if any, as a matter of law, lay only in negligence with respect to the improvidence, if any, of the Third Mate's order assigning only two men to the task (R28-R30, R32-R33, R54-R56).

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* Certainly, on respondent's motion to dismiss at the close of all the evidence, petitioner's testimony and that of his expert was entitled to be treated as true and the most favorable inferences granted in evaluating whether the evidence was sufficient to present a jury case. *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 329, 330-1 (1960). Captain Darrigan's opinion, although perhaps not necessary to petitioner's *prima facie* case, was clearly admissible and raised an issue for jury determination. *Eastern Transportation Line* v. *Hope*, 95 U. S. 297 (1877); *Carlson* v. *Chisholm-Moore Hoist Corp.*, 281 F.2d 766, 772 (2d Cir. 1960).

** Judge Tenney had made a contrary ruling earlier in the trial; i.e., that "the failure to supply a sufficient number of men on this particular operation . . . constituted unseaworthiness" (R29, see also R32-R33).

Petitioner's post-trial motion for a new trial (R58-R60) was made on April 27, 1964 (R57) and decided on November 9, 1964 (R60). The District Court adhered to its dismissal on the grounds of *The Magdapur,* 3 F. Supp. 971 (S. D. N. Y. 1933) and "certain language" in the opinions in *Pinto* v. *States Marine Corp. of Delaware,* 296 F. 2d 1, 3 (2d Cir. 1961), pet. for rhg. den., 296 F. 2d 8, cert. den. 369 U. S. 843, 891 and *Ezeki* v. *Volusia Steamship Co.,* 297 F. 2d 215, 217 (2d Cir. 1961), cert. den. 369 U. S. 843 (Opinion of Tenney, J.; R60-R62).

On the appeal to the Court of Appeals, the dismissal was affirmed by a divided panel, Senior Judge Medina writing for himself and Chief Judge Lumbard and Circuit Judge Smith dissenting (356 F. 2d 247; R62-R72).

Judge Medina's opinion extensively reviewed the law of unseaworthiness and noted the absolute nature of the liability to seamen injured during the performance of their employment duties (356 F. 2d at 249-251; R65-R68). Judge Medina's opinion recognized that unseaworthiness may be found by a jury although only a portion of the ship's equipment is defective, although safe gear is available but is not used for the particular work involved and although the gear itself is not defective but a maladjustment or misuse of it creates a dangerous condition (356 F. 2d at 250; R68).

Nevertheless, Judge Medina's opinion concluded that these principles of liability apply only to defects, nonuse or misuse of gear or equipment, and do not apply where the dangerous condition arises out of nonuse of misuse of ship's personnel (356 F. 2d at 251-2; R69-R71). He ruled that with respect to the crew all that is required is that the vessel have an overall sufficiency of manpower aboard the ship, that any failure to provide sufficient personnel for a particular task may not constitute unseaworth-

iness and that liability, if any, arising out of such circumstances must be based on a proof of personal negligence or "imprudent action" on the part of the officer responsible for allocating and assigning the personnel or proof of inherent incompetence on the part of the officer (356 F. 2d at 251-2; R69-R71).

No citation of controlling authority was offered by Judge Medina for this arbitrary distinction between liability for improperly used or insufficient equipment and for improperly used or insufficient personnel.

Judge Smith, dissenting, stated that there were two independent grounds on which unseaworthiness could have been found. The first was that the handling of the otherwise seaworthy manila rope by only two men, when there was expert testimony that three or four men were required, constituted a misuse of otherwise seaworthy gear. According to Judge Smith the creation of a dangerous condition by such misuse of gear was a ground for unseaworthiness liability under principles stated by this Court in *Crumady* v. *The Joachim Hendrick Fisser,* 358 U. S. 423 (1959) and directly applicable recent decisions of the 3rd and 9th Circuits (356 F. 2d at 252; R72).

Secondly, upon the conceded principle that an insufficiently manned vessel may be found unseaworthy and petitioner's proof that there was a shortage of personnel provided at the time and place his task was done, unseaworthiness liability could lie. Judge Smith observed that respondent's defense "that the crew was as a whole complete" was "another form [of] the defense rejected in *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96 (1944)" (356 F. 2d at 253; R72). Judge Smith stated that the decision in *The Magdapur,* 3 F. Supp. 971 (S. D. N. Y. 1933) to the contrary, heavily relied upon by the majority (see 356 F. 2d at 251; R70), decided 33 years ago, "cannot

stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*" (356 F. 2d at 253; R72).*

POINT I

The decision below is clearly contrary to the settled law enunciated by this Court and followed by the lower Courts.

It is beyond dispute that overall insufficiency of manpower aboard ship constitutes an unseaworthy condition. *June T., Inc.* v. *King*, 290 F. 2d 404, 407 (5th Cir. 1961); *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585, 587 (2d Cir. 1962); *In re Pacific Mail S. S. Co.*, 130 F. 76, 82 (9th Cir. 1904). As was stated in *June T., Inc.* v. *King, supra:*

> "to be inadequately or improperly manned is a classic case of an unseaworthy vessel." (290 F. 2d at 407).

The sole basis offered for upholding the dismissal below was the claim that notwithstanding the evidence that there was a shortage of manpower at the time and place the work was done, the existence of an overall sufficient complement of men aboard the ship rendered the claim invalid as a matter of law.

Precisely this defense was struck down by this Court in *Mahnich* v. *Southern SS. Co.*, 321 U. S. 96, 103-4 (1944). *Mahnich* involved a situation where:

> "A seaman . . . was injured . . . by a fall from a staging which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging." (321 U. S. at 97)

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* The "obsolescence" of pre-1940 lower court decisions in this area has been specifically noted by Professor Gilmore and Black's text. *The Law of Admiralty*, § 6-6, p. 253, fn. 12.

This Court held that unseaworthiness constituted a "rule of absolute liability" (321 U. S. at 101) to be applied regardless of "whether the mate's failure to observe the defect was negligent or unavoidable" (321 U. S. at 103) and regardless of whether the injured seaman himself "knew of the defective condition of the rope" (321 U. S. at 103).

The Court further stated:

> "Nor does the fact that there was sound rope on board to rig a safe staging, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one." (321 U. S. at 103)

It specifically held that:

> "These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished *when and where the work is to be done.*" (321 U. S. at 103-4) (Emphasis added)*

The fact that the total number of seamen in the crew was sufficient for the general operation of the vessel was long ago held no defense to the contention of unseaworthiness. *In Re Pacific Mail Steamship Co.*, 130 Fed. 76 (9th Cir. 1904). The Court there stated:

> "It is, as was said by Judge Hawley in Re Mayer (D. C.) 74 Fed. 885, 'the *duty of the owners* of a steamer carrying goods and passengers, not only *to provide* a seaworthy vessel, but they must also provide the vessel with a *crew adequate in number,*

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* The importance of the *Mahnich* opinion was restated by this Court in 1960 in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 548—"While it is possible to take a narrow view of the precise holding in that case, the fact is that *Mahnich* stands as a landmark in the development of admiralty law."

> and competent for their duty with reference to all the exigencies of the intended route'; *not merely competent for the ordinary duties of an uneventful voyage,* but *for any exigency* that is likely to happen, such, for example, as unfortunately did happen in the present case—the striking of the ship on a reef of rocks—and the consequent imperative necessity for instant action to save the lives of passengers and crew. *The duty rested upon the petitioner to be prepared for such an emergency,* not only *by reason* of the statute cited, but by *the general maritime law.*" (130 Fed. at 82) (Emphasis added)

Overall sufficiency on board of ship's equipment is not a defense to the claim of unseaworthiness, for a seaman must be provided with sufficient and satisfactory equipment and help while performing the task involved in his injury. Otherwise the ship may be found unseaworthy, notwithstanding the presence on board of adequate equipment. *Street* v. *Isthmian Lines, Inc.,* 313 F. 2d 35, 36, 38 (2d Cir. 1963), cert. den. 375 U. S. 819.

In *Street* the hacksaw desired by the seaman to perform his task was present aboard the vessel but locked in the toolroom. The seaman instead made makeshift use of an available chisel with resultant injury to himself.

The Court unanimously held that the unseaworthiness claim was properly submitted to the jury (313 F. 2d at 38) and stated its agreement with the similar case of *Cox* v. *Esso Shipping Co.,* 247 F. 2d 629 (5th Cir. 1957). Extensive language from the *Cox* opinion was approved and incorporated into this Court's decision in *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 327-8 (1960).

Similarly, it was recently held that although a vessel had proper ventilating equipment installed and fit to operate, the failure to cause the ventilating system to be put into operation while longhoremen were working in the hold meant that the vessel had "breached its warranty of sea-

worthiness". *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 859-860 (S. D. N. Y. 1963), aff'd 328 F. 2d 40, 41 (2d Cir. 1964).

As Judge Weinfeld there stated:

> "As to the latter claim [of unseaworthiness], the *fact that the vessel had an available ventilating system does not preclude a finding of unseaworthiness.* A *shipowner's duty* does not end if it provides adequate and seaworthy equipment; its duty *is a continuing one* and *requires* that such *equipment be furnished when and where the work is to be done.* The *failure to put it in effective operation* under the existing conditions *rendered the vessel* just as *unseaworthy* as if it lacked such equipment." (215 F. Supp. at 860) (Emphasis added.)

It should be sufficiently clear from *Mahnich, supra, Street, supra, Cox, supra,* and *Misurella, supra,* that the presence aboard ship of sufficient equipment does not, as a matter of law, compel a dismissal of the unseaworthiness claim, where the plaintiff has submitted evidence that as to his particular task he was not actually furnished sufficient or proper equipment "when and where the work was to be done" (*Mahnich,* 321 U. S. at 104).

The fact that the unsafe condition in the instant case arose out of the misuse or nonuse by the Third Mate of otherwise good or available personnel or equipment does not immunize the ship from a claim of unseaworthiness or restrict the claim to one solely of negligence.

The Third Mate may not have been negligent in failing to add another man to assist the plaintiff, in view of the lack of time in the fast-moving dock operation and the other tasks these personnel had to perform. (See R33, R39-R46). But regardless of the Mate's lack of negligence, if the adjustment or assignment of the personnel or method of work selected was such as to render the situation "unsafe", as the plaintiff's maritime expert testified (R38), an unseaworthiness claim properly lay.

It is the essence of unseaworthiness liability that it is "unrelated to principles of negligence law". *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 547 (1960). Lack of shipowner's or officer's opportunity to correct or even become aware of the dangerous condition or the speed with which the "threat materialized" are not defenses to a claim of unseaworthiness. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34, 35, 37 (2d Cir. 1965).

Unseaworthiness liability here also arose because a dangerous condition was caused by an improper method of operation and misuse of otherwise seaworthy equipment. The decisions below are in conflict with the basic principles laid down by this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959).

In *Crumady* stevedores used a winch and cargo loading equipment which had a maximum safe working load of 3 tons and was in good condition, but set the cut-off device at 6 tons (358 U. S. at 425). Although the equipment was not inherently defective and the dangerous condition arose only because of the maladjustment of the safety device, these acts gave rise to an unseaworthy condition, irrespective of whether there was also negligence. This Court stated:

> "The *winch*—an appurtenance of the vessel—*was not inherently defective* as was in the rope in the Mahnich case. *But it was adjusted* by those acting for the vessel owner *in a way that made it unsafe and dangerous for the work at hand.* While the rigging would take only three tons of stress, the cut-off of the winch—its safety device—was set at twice that limit. This was rigging that went with the vessel and was safe for use within known limits. Yet those limits were disregarded by the vessel owner when the winch was adjusted. *The case is no different in principle from loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved.* In that case the cable or rope, in this case the winch, makes

the vessel pro tanto unseaworthy." (358 U. S. at 427-8). (Emphasis added.)

Similiarly, in the instant case, the Third Mate's adjustment of his work force, by providing only two men to haul or handle a load where the strength of additional men was required, and the method of operation of hauling the rope by only two men, must be deemed to have given rise to a jury issue as to the creation and presence of an unseaworthy condition. See also, *Morales* v. *City of Galveston*, 370 U. S. 165, 170 (1962); Note: *Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. Law Rev. 819, 828 (1963).

This Court's opinions of the past 20 years have broadly expanded the concept and the coverage of unseaworthiness, as was explicitly noted in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960), *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113, 123 (4th Cir. 1964), *Ferrante* v. *Swedish-American Lines*, 331 F. 2d 571, 578 (3rd Cir. 1964) and Gilmore & Black, *The Law of Admiralty* (1957), p. 253, fn. 12. It is now clear that a failure to provide reasonably safe working conditions to a seaman, albeit a temporary, slight or uncorrectible failure, may impose strict liability upon the shipowner rather than leave the burden upon the injured seaman alone. See, *e.g.*, *Mahnich* v. *Southern S.S. Co., Inc.*, *supra*; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 92-6 (1946); *Boudoin* v. *Lykes Bros. S.S. Co., Inc.*, 348 U. S. 336, 339 (1955); *Crumady* v. *The Joachim Hendrick Fisser*, *supra*; *Mitchell* v. *Trawler Racer, Inc.*, *supra*; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327-8 (1960); *Gutierrez* v. *Waterman S.S. Corp.*, 373 U. S. 206, 213 (1963); *Reed* v. *The Yaka*, 373 U. S. 410, 413 (1963).

The instant case would carve out from the protection of these strict liability principles of unseaworthiness the ordinary, frequently recurring accident case where a low echelon laborer aboard ship is directed, alone or with in-

sufficient help, in the exigencies and possible haste of shipboard employment, to haul, pull, lift or tug a heavy piece of equipment or object aboard ship and is thus injured.

Had the manila line here involved been hauled on a dolly or hand truck of insufficient strength which collapsed, a jury issue as to liability for unseaworthiness would surely have been presented. That the load-carrying mechanism was too weak because of shortage of personnel can, in logic or social policy, dictate no different result.

Inexplicably, Judge Medina's opinion below applies this arbitrary and artificial distinction and insists on denying strict liability protection to the injured seaman if the order involves provision of personnel rather than selection of gear. Such a distinction is precisely contrary to this Court's view expressed in *Boudoin* v. *Lykes Bros. SS. Co.*, 348 U. S. 336 (1955), where it stated that on the issue of unseaworthiness there is:

> "no reason to draw a line between the gear on the one hand and the ship personnel on the other". (348 U. S. at 339)

Thus in *DiSalvo* v. *Cunard S.S. Co.*, 171 F. Supp. 813, 825-8 (S. D. N. Y. 1959) a seaworthy chute was handled improperly pursuant to the orders of a shipping company's officer and an injury to a maritime worker arising out of such mishandling.

Judge Herlands there specifically emphasized that:

> "The human factor may have as much practical effect in creating unseaworthiness as a mechanical flaw or physical defect." (171 F. Supp. at 825)

The petitioner's claim in this case has been, throughout, that the *condition* of two men straining on, hauling and supporting the 56 feet, and over 100 pounds, of 8-inch

manila line constituted unseaworthiness, regardless of whether that condition came about by way of an improvident order of the mate or because of some other exigency.

This ordinary type of accident situation of an insufficient number of men handling and supporting a load and strain too heavy for their strength and number—a situation that is perhaps more likely and common than almost any other to arise in the daily work of the manual laborers of a ship's crew—simply does not fit into "the almost theoretical construct" and "rare . . . circumstances" of a ship worker's accident arising out of "negligence but not unseaworthiness". See, *Pinto* v. *States Marine Corp. of Del.*, 296 F. 2d at 3; *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d at 217; Instant Case, 356 F. 2d at 252, R61-R62, R70-R71). This large group of situations should not be banished by this Court from the protection of the ancient and humanitarian doctrine of seaworthiness.

The extraordinary and arbitrary nature of the decisions below is pointed up by the fact that petitioner's negligence claim was not dismissed, but the unseaworthiness claim was held legally insufficient (R56). Mr. Justice Frankfurter pointed out that "it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness", *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 418 (1953). Professors Gilmore and Black have noted that such a circumstance is an "almost theoretical construct". Gilmore and Black, *The Law of Admiralty* (1957), p. 320.

The Second Circuit has now extended this "rare" and "theoretical" concept into a systematic barrier to jury determination of this common type of martime accident. See *Pinto* and *Ezekiel, supra*. The *Pinto* decision, adopted by a sharply divided Court (see 296 F. 2d at 8) and relied upon here by the trial and appellate courts below (356 F. 2d at 252; R61-R62, R70-R71), has drawn the criticism of com-

mentators * even before its expansion in the instant case, and has not been followed by any of the other circuits.

The petitioner produced proof that additional assistance should have been provided. Nevertheless, the courts below denied him the right to submit his case to a jury, unless he could prove that the officer at the scene, responding to the shipboard conditions, was inherently incompetent or negligent in directing the urgent work (356 F. 2d at 251-2; R69-R70).

It was precisely to avoid placing these difficult burdens of proof upon the injured seaman that the entire doctrine of unseaworthiness was created and developed. We respectfully submit that this Court should reverse the result below, lest a substantial exception to the humanitarian doctrine of unseaworthiness be carved out by the majority opinion below contrary to the teachings and policies oft-enunciated by this Court.

POINT II

The decision below is contrary to numerous decisions of the several Circuit Courts of Appeals.

There is direct conflict between the majority decision below in this case on one hand and the opinions of the Ninth Circuit in *American President Lines Ltd.* v. *Redfern*, 345 F. 2d 629 (1965) and the Third Circuit in *Ferrante* v. *Swedish-American Lines*, 331 F. 2d 571 (1964), pet. for cert. dimissed pursuant to R. 60, 379 U. S. 801 and

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* See, Note: *Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. Law Rev. 819, 824 (1963)—"Under *Mitchell* (the decision in *Pinto*) probably is error." See also, *Admiralty*: *Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Rev. 1180, 1183, fn. 24 (1966)—*Pinto* and *Ezekiel's* "undue concern as to negligence principles" criticized.

Thompson v. *Calmar SS. Corp.*, 331 F. 2d 657 (3rd Cir. 1964), cert. denied 379 U. S. 913 on the other hand.* *Hroncich* v. *American President Lines, Ltd.*, 334 F. 2d 282 (3rd Cir. 1964), *Scott* v. *Isbrandtsen Co., Inc.*, 327 F. 2d 113 (4th Cir. 1964) and *Blassingill* v. *Waterman SS. Corp.*, 336 F. 2d 367 (9th Cir. 1964) are also in conflict with the prevailing position below in this case.

In *Redfern*, the seaman's immediate superior ordered him to go down alone to the engine room and open a large sea valve. The exertion of performing this task injured his back. On a libel tried before a judge alone, he recovered a substantial verdict specifically on the grounds of unseaworthiness (345 F. 2d at 630, 631).

The record on appeal in *Redfern* demonstrates that there was no claim of any overall shipboard shortage of manpower nor was it the "tendency to stick" of the valve that constituted the unseaworthy condition (345 F. 2d at 632). The Ninth Circuit specifically held that the vessel was unseaworthy on the grounds of being "improperly manned" (345 F. 2d at 632), and that the operation of the otherwise seaworthy valve by one man alone, where two men were required, constituted "a dangerous condition" (345 F. 2d at 631), justifying the trier of facts' findings of liability for unseaworthiness.

The conflict with the Ninth Circuit's recent opinion in *America President Lines, Ltd.* v. *Redfern*, 345 F. 2d 629 (1965) was recognized and emphasized by Judge Smith below (R72). Respondent's tortured distinction that the sea valve involved in *Redfern* was inherently defective because two men were required to turn it is directly rebutted by plain common sense and by the Ninth Circuit's

* Respondent conceded the conflict with the Third Circuit decisions below. See Appellee's Brief to the Court of Appeals, pp. 15-16, a copy of which has been lodged with the Clerk of the Court.

opinion (345 F. 2d at 631-2; R72).* The Court there stressed that sea valves are intentionally large and difficult to open, and are fit for their purpose only if they are so difficult. Liability for unseaworthiness was found by the Ninth Circuit in *Redfern* specifically because only one man was provided to open this otherwise seaworthy valve, and the condition of one man doing a job that required two men was—at least in the Ninth Circuit's view—a situation within the protection of the doctrine of unseaworthiness.

In the instant case, petitioner was lifting and hauling heavy manila line instead of opening a large sea valve. In the instant case, the plaintiff's expert testimony stated that 3 or 4 men were required to handle this equipment properly; in *Redfern*, the necessary minimum was two men.

We fail to see any substantive distinction between the *Redfern* case and the case at bar. *Redfern* is the same case of misuse of otherwise proper gear and provision of insufficient manpower as is the instant case.

In both *Ferrante* and *Thompson, supra,* the Third Circuit, in extensive opinions, held that where the method of operation and use of safe equipment gave rise to an unsafe condition, liability for unseaworthiness, without any showing of negligence on the part of the shipowner or its employees, could be found. The Third Circuit in *Thompson* quoted and itself emphasized the following from this Court's decision in *Morales* v. *City of Galveston,* 370 U. S. 165, 170 (1962):

> "'A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in dis-

* The same analysis of *Redfern*—as a case finding unseaworthiness because of inadequate manpower rather than because of any defect in gear—is set forth in *Admiralty*: *Inadequate Manpower and the Unseaworthiness Doctrine,* 66 Col. Law Rev. at 1182, 1185 (June, 1966).

> repair, her crew unfit. *The method of loading her cargo,* or the manner of its storage might be improper. (Emphasis supplied)' " (331 F. 2d at 65)

In *Ferrante,* the Court's opinion contained a full review of the recent authorities imposing unseaworthiness liability for adoption of improper "method of operation" (331 F. 2d at 577). It noted this Court's decisions indicating the "doctrinal trends" (331 F. 2d at 578) toward completing the protection of the maritime worker injured by an industrial accident. The Court reversed the lower court's dismissal of the libel on the ground that the "stevedore's method" (331 F. 2d at 578) rendered the vessel unseaworthy, stating:

> "Whether the operation is regarded as 'stowage' of the piles of boards as part of the discharge process, or the construction of a 'draft,' or as the mere use of the ship's equipment—the manila ropes —the fact remains that the stevedore 'failed to perform safely, a basis for liability including negligent and nonnegligent conduct alike', and that made the ship unseaworthy." (331 F. 2d at 578)

In *Scott* v. *Isbrandtsen Co., Inc.,* 327 F. 2d 113 (4th Cir. 1964), the longshoreman was injured when a bale that should have been handled by two men was handled by one man and got loose and fell upon him (327 F. 2d at 124). The Fourth Circuit held that this:

> ". . . method of operation may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable" (327 F. 2d at 125-6).

The Court reversed and remanded for a new trial because of the trial court's failure to submit that issue to jury (327 F. 2d at 128).

Hroncich v. *American President Lines Ltd.,* 334 F. 2d 282, 285 (3d Cir. 1964) is almost identical to *Scott,* and

also holds that the method of operation, if improper and unsafe, may constitute unseaworthiness.

Similarly, the Ninth Circuit in *Blassingill* v. *Waterman Steamship Corp.*, 336 F. 2d 367, 368-70 (1964) held that "an improper method of using" sound gear may constitute unseaworthiness, and that it was error for the trial court to refuse to submit such an issue to the jury.

The above-cited recent cases make clear that at least in the Third, Fourth and Ninth Circuits stevedores and longshoremen can impose unseaworthiness liability upon a vessel by ordering or adopting an *improper method of work*. If such improper method of work, adopted without the control or knowledge of the shipowner's officers, can impose unseaworthiness liability, *a fortiori*, an improper work method, adopted by a crew member pursuant to a ship's officer's directive, may similarly render the vessel unseaworthy.

The issue of whether an unsafe condition is within the reach of the doctrine of unseaworthiness when seaworthy equipment is improperly or insufficiently used at the time and place of injury has caused considerable consternation and dispute among the judges of the Second Circuit Court of Appeals, the circuit which has within it the heaviest concentration of seamen's cases. *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1 (2nd Cir. 1961), *cert. denied*, 369 U. S. 843 and *Ezekiel* v. *Volusia SS Co.*, 297 F. 2d 215 (2nd Cir. 1961) *cert. denied* 369 U. S. 843, both decided by sharply divided courts, held that the doctrine of unseaworthiness did not reach such a situation. On the other hand, particularly in recent years, the majority of the same court has tended to find that the doctrine of unseaworthiness does apply to such situations, albeit again over sharp dissents. See, *Radovich* v. *Cunard Steamship Co.*, 364 F. 2d 149 (2nd Cir. 1966); *Mosley* v. *Cia. Mar. Adra S.A.*, 362 F. 2d 118 (2nd Cir. 1966) and *Skibinski* v. *Waterman Steamship Corp.*, 360 F. 2d 539 (2d Cir. 1966).

Radovich, Mosley and *Skibinski* all involved longshoremen, whose successful suit depended upon a finding of unseaworthiness rather than negligence. The working personnel and orders were those of their fellow longshoremen, and absent unseaworthiness liability would not have been imposed on the ship owner.

Other recent instances, however, exist where the prevailing majority of the Second Circuit panel ruled against the maritime worker and declined to apply the protection of the unseaworthiness doctrine. See, e.g. *Walters* v. *Moore-McCormack Lines,* 309 F. 2d 191 (2d Cir. 1962), rehear. den. 312 F. 2d 893 (2d Cir. 1963); *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752 (2d Cir. 1962), cert. den. 371 U. S. 840 and the instant case, decided in 1966.

A basic issue involved in this and the other recent maritime cases is whether the doctrine of unseaworthiness is available where a maritime worker is injured by an unsafe condition immediately rising out of improper or insufficient use of otherwise safe equipment or personnel, even though no appreciable time intervenes and no opportunity to correct the dangerous condition is available. In view of the continuing sharp divisions of attitude expressed in the Second Circuit opinions above cited and the clear relationship of the issues there raised and those raised in the instant case, a statement of this Court on this basic issue would be extremely beneficial to the maritime bar in the Second Circuit and throughout the entire country. This case presents an opportunity to this Court, whose crowded docket permits it to take so few maritime cases, dispositively to deal with these important issues in the opinion announcing its decision herein.

We respectfully direct this Honorable Court to the scholarship and reasoning set forth in the majority opinions in *Radovich, Mosley* and *Skibinski,* and we respectfully submit that the position there expressed is directly consistent with the attitudes enunciated by this Court in *Mah-*

nich v. *Southern SS Co.*, 321 U. S. 96, 101, 103-4 (1944) and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 92-6 (1946) and more recently re-enunciated in *Reed* v. *The Yaka*, 373 U. S. 410, 413 (1963) and *Gutierrez* v. *Waterman SS Corp.*, 373 U. S. 206, 213, 215 (1963).

In *Reed*, Mr. Justice Black recalled this Court's classic enunciation of the underlying social policy applicable to seamen injured during the course of their employment and stated:

> "In Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946), . . . we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness." (373 U. S. at 413).

Similarly, Mr. Justice White, expressing the views of eight members of the Court in *Gutierrez*, emphasized the continuing viability of the *Sieracki* and *Mitchell* decisions of this Court (373 U. S. at 213) and upheld the "ineluctable" logic of the past authorities in allowing "recovery on unseaworthiness while denying it on negligence" (373 U. S. at 215).

Indeed, in *Gutierrez* Mr. Justice Harlan's dissent asserted that the only remaining exception to the reach of the doctrine of seaworthiness, at least before the majority decision in *Gutierrez*, was that the shipowner did not have an absolute duty with respect to the safety and condition of the cargo (373 U. S. at 217). Mr. Justice Harlan, as well as the eight members of the majority, fully accepted the concept that the shipowner's duty has become absolute and that the transitory nature of conditions arising aboard ship during the voyage in no way reduces the shipowner's liability to the injured seaman (373 U. S. at 217).

Since *Gutierrez* and *Reed* this Court has not spoken on the scope of the doctrine of seaworthiness. However

its most recent statements in *Gutierrez* and *Reed*, coupled with the concepts developed in *Mahnich* v. *Southern SS. Co.*, *Sieracki* v. *Seas Shipping Co.*, *Boudoin* v. *Lykes Bros. SS. Co.*, *Crumady* v. *Joachim Hendrick Fisser* and *Mitchell* v. *Trawler Racer, Inc.*, dictate reversal of the result below and a reaffirmation of the absolute and humanitarian doctrine of seaworthiness as a form of protection to those seamen and maritime workers who are injured aboard ships during the course of their work as a result of unsafe conditions arising out of defective, insufficient or improperly used equipment or personnel.

This case does not call upon the Court to determine that the shipowner is an insurer who must always provide an accident-free ship. A seaman who is exposed to injury by hurricane or unusual storms is not entitled—and no reported cases even indicate an attempt—to invoke the doctrine of unseaworthiness in seeking monetary compensation for his pain, suffering, limitation of motion, disability and loss of earnings for injuries so sustained. But when the seaman is injured during routine work procedures aboard ship, on the high seas, during docking operations—as here—or while the ship is tied up in port, he does assert that if the doctrine of unseaworthiness is to have substantial meaning and if the concept of an absolute obligation to provide a reasonably safe ship at the precise time and place the work is done is to have real purpose, then the doctrine of unseaworthiness is to mean what petitioner herein urges and is not to be artificially imprisoned within the restrictive boundaries urged by respondent below and adopted by the majority opinion. Such restrictive conceptions are out of keeping with the long line of decisions of this Court, are inconsistent with the numerous opinions above-cited of the Court of Appeals for the Second Circuit and the other Circuits, have been sharply criticized by the commentators, and are contrary to the underlying social policy and goals so clearly established by this Court.

The position urged by petitioner here has been applied by the lower courts in recognition of the "doctrinal trends" and direction of this Court's prior decisions. Thus in *Reid* v. *Quebec Paper Sales & Tramsp. Co.*, 340 F. 2d 34 (2d Cir. 1965), Judge Marshall, writing for the Court's majority, stated:

> "every act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it. Under the rubric of a 'breach of the warranty of seaworthiness' the courts have held shipowners responsible for accidents resulting from unsafe conditions of the workplace, regardless of whether the shipowner had actual or constructive notice or the means or opportunity of correcting them, and, *if all assessments of fault are to be truly irrevelant, it is not at all clear why this responsibility does not encompass any conduct at the workplace which creates a threat to the safety of the other workmen.*" (emphasis added) (340 F. 2d at 37).

Judge Weinfeld's eloquent opinion in *Rodriguez* v. *Constal Ship Co.*, 210 F. Supp. 38, 42-44 (S.D.N.Y. 1962), rejected a similar defense to that raised here. The shipowner there urged the unavailability of the doctrine of unseaworthiness to the risk of the type of injury which unavoidably arises during normal shipboard work and exigencies. Judge Weinfeld held that under the doctrine of unseaworthiness the very least the shipowner can do is "accept the financial consequences of injuries to men resulting from any uncorrected hazardous condition" (210 F. Supp. at 44). He noted that the "plea" of unavoidability:

> "in effect, amounts to a negation of the 'humanitarian policy' underlying the seaworthiness doctrine and if accepted would revive the now discarded concept of assumption of risk. . . . (T)o the contrary, the policy has been to assess the cost of the hazards of marine service, 'insofar as it is measurable in money', upon the shipowner and not the worker, since he '* * * is in position, as the worker is not,

to distribute the loss in the shipping community which receives the service and should bear its cost.' " (210 F. Supp. at 42-3)

See also, *e.g.*, *Farrante* v. *Swedish-American Lines*, 331 F. 2d 571, 577-8 (3rd Cir. 1964).

POINT III

The doctrine of unseaworthiness is fully applicable to the instant case and circumstances.

It is axiomatic that use of inadequate equipment such as a defective rope or cable to support a heavy load may constitute unseaworthiness. This doctrine should apply with equal logic and force to the use of inadequate manpower to support a heavy load. In short, whether a rope that is too thin or frayed or a number of men that are too few or weak are employed for a particular lifting operation aboard ship, the liability for unseaworthiness should be identical.

Notwithstanding its apparent common and fundamental nature, the issue of whether unseaworthiness liability may be found for shortage of personnel for a particular task on an otherwise fully manned vessel has never been dealt with directly by this Court. Except for the instant case, it has been determined directly in only two lower court decisions. These are *American President Lines, Ltd.* v. *Redfern*, 345 F. 2d 629 (9th Cir. 1965), decided in favor of the seaman, and *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933), decided in favor of the shipowner.

The Magdapur was decided 33 years ago, long before this Court's landmark decisions in *Mahnich*, *Boudoin*, *Crumady* and *Mitchell* and well before the pioneering opinion of Judge Learned Hand in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (2d Cir. 1952), which first established the equivalence of failures of ship's gear and ship's per-

sonnel in giving rise to liability under the doctrine of unseaworthiness.

Redfern decided in the seaman's favor, and the differing view of the lower courts in the instant case, have already attracted the attention of the commentators. Thus, *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine,* 66 Columbia Law Rev. 1180, 1181 (June, 1966) states:

> "two recent Court of Appeals decisions [*Waldron* and *Redfern*] have reached conflicting conclusions as to whether a failure to allocate an adequate number of crewmen to perform a particular duty comprises unseaworthiness."

The note sharply criticizes the decision below in this case, stating:

> "The distinction drawn in *Waldron* between improper use of sound gear, which may constitute unseaworthiness, and similar misuse of crew, which does not, finds little support in logic, or in the humanitarian policy which underlies the expanding remedy. Nor does precedent dictate the restricted duty when misuse of crew is involved." (66 Col. Law Rev. at 1182)

The article further critizes the Second Circuit injection of negligence doctrines into unseaworthiness determinations (66 Col. Law Rev. at 1183) and points out that *Waldron* conflicts with other recent Third and Fourth Circuit decisions (66 Col. Law Rev. at 1183, fn. 22 and at 1185, fn. 39). It concludes that the *Waldron* doctrine rests on "irrational distinctions" contrary to the policy and humanitarian trends dictated by this Court's opinions over the past "two decades" (66 Col. Law Rev. at 1185).

Provision of insufficient personnel or assistance to carry, move or lift a heavy object or load aboard ship often gives rise to injury to lower echelon maritime employees. As technological advancement improves and refines mechanical

equipment, those injuries which do occur are more and more the result of the human misuse of otherwise fit gear. Unless the result below is reversed, more and more seamen's cases will be taken away from the jury and dismissed as a matter of law.

If the decision below were left standing, it would breath new vitality into the *Magdapur* doctrine upon which it specifically relies (356 F. 2d at 251, 2; R61, R70). As the authorities above cited demonstrate, this would be contrary to all that has been achieved and developed by this Court in this area over the past 25 years.

This Court has emphasized that in seamen's cases the jury "plays a pre-eminent role". *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957); *Michalic* v. *Cleveland Tankers Inc.*, 364 U. S. 325, 330-1 (1960). It has repeatedly held that directed verdicts and dismissals of seamen's claims are to be granted only in the rarest circumstances. The policy of the majority of this Court has been to prevent "erosion" of the role of the jury in the determination of FELA and seamen's cases, and reversals have been particularly granted "when the statutory or constitutional right to decision by a jury" has been interfered with below. See, *e.g.*, *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 509 (1957).

In the instant case, petitioner presented eye-witness testimony that he was injured while hauling a heavy manila line on the ship's deck, while acting pursuant to orders and in the direct line of the duties of his maritime employment. Petitioner also presented expert testimony by a ship's master of 50 years' maritime experience that the performance of this task by only two men involved a shortage of personnel and an unsafe method of operation.

Petitioner's injury was caused by an insufficiency of personnel for the particular task at hand and by adoption of an improper work method, or, as Judge Smith dissenting below alternatively phrased it, through "using equipment in a manner which makes it unsafe" (R72).

The trial court's dismissal of this claim as a matter of law took away its determination from the jury which had heard the evidence. Petitioner was entitled to a jury determination of his claim and the judicial dismissal below should be reversed, with remand to the District Court for a new trial.

CONCLUSION

Petitioner was improperly denied a jury trial of his claim for recovery of damages arising out of injuries sustained during his maritime employment.

At the time and place petitioner was injured aboard defendant's vessel an insufficient number of men were provided for the task at hand, and there was testimony that this constituted an unsafe condition.

There was testimony that the manner of using and moving the heavy manila line at the time and place of petitioner's injury was unsafe and improper, and the condition which thus arose was within the protection of the doctrine of unseaworthiness.

The judicial dismissal below of petitioner's claim was error, the judgments below must be reversed and the action should be remanded to the District Court for a new trial.

Respectfully submitted,

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